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Supreme Court of The United States

OCTOBER TERM, A. D. 1942

No. 577

CHARLES M. THOMSON, Trustee of the Property of CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS (Herman E. Stoll),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND SUPPORTING BRIEF.

WILLIAM T. FARICY,
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Counsel for Petitioner.

NELSON J. WILCOX,
BRENNAN J. SLATER,
Of Counsel.

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No. .....

CHARLES M. THOMSON, Trustee of the Property of CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS (Herman E. Stoll),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

Charles M. Thomson, Trustee of the property of Chicago and North Western Railway Company, respectfully shows to this Honorable Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This proceeding originated in an application filed by Herman E. Stoll with the Industrial Commission of Illinois for an award of compensation under Section 8 of the Illinois Workmen's Compensation Act (Illinois Revised

Statutes, 1939, Chapter 48, paragraph 145). Stoll, who is hereinafter referred to as respondent, sought compensation for injuries suffered by him while employed by petitioner. Respondent's duties were to patrol the right of way in the various districts to which he was assigned; look out for fires; eject or arrest trespassers; examine and test seals on cars (both interstate and intrastate); protect the cars and their contents from thieves and trespassers; inspect passing trains (both interstate and intrastate) for hot boxes and other defects; and observe the tracks for broken rails and obstructions (R. 8-11).

Petitioner was at all times herein involved the duly qualified trustee of the property of the Chicago and North Western Railway Company and operated such property as a common carrier, engaged in both interstate and intrastate transportation (R. 15, 16, 22, 23). As such he was therefore subject to the Federal Employers' Liability Act (U. S. Code Title 45, Sec. 51, et seq.).

On March 11, 1940, shortly after reporting for work, respondent, while in the performance of his said duties and in going from petitioner's North Avenue yard office along petitioner's right of way to another portion of the railroad yard, was assaulted by trespassers and injured (R. 7). The Industrial Commission allowed his claim and awarded him compensation under the Illinois Workmen's Compensation Act (R. 27, 30). The award was affirmed by the Circuit Court of Cook County (R. 30) and by the Supreme Court of Illinois (R. 61, 62).

The Supreme Court of Illinois held that respondent was not engaged in interstate commerce at the time of his injury; that although certain of his regular duties were in furtherance of interstate commerce, the work he was doing at the time of his injury was not, and that the Employers' Liability Act is applicable only in cases where the employee

is at the very time of his injury performing a duty in furtherance of interstate commerce; that any other interpretation of the language of the amendment of August 11, 1939 would result in such amendment being "beyond the powers of Congress" (R. 55-61).

JURISDICTIONAL STATEMENT.

This court has jurisdiction by reason of Section 344(b), Title 28, U. S. Code, permitting certiorari in cases where a final judgment or decree has been rendered by the highest court in the State in which a decision could be had, and where there is drawn in question the validity of a statute of the United States.

The judgment herein involved has been rendered by the highest court of Illinois, the Supreme Court of the State. The statute, the validity of which has been called in question, is the August 11, 1939 amendment to 53 Stat. L. 1404; Section 51, U. S. Code, Title 45 (Federal Employers' Liability Act). This amendment is as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

This court also has jurisdiction by reason of the fact that by the judgment of the Supreme Court of Illinois petitioner has been denied the right to have his liability, if any, determined by the provisions of the Federal Employers' Lia-

bility Act as amended. Cases believed to sustain jurisdiction on this ground are *Straus* v. *Am. Publishers' Ass'n.*, 231 U. S. 222, 233 and *Southern Ry. Co.* v. *Crockett*, 234 U. S. 725, 730.

The opinion of the Supreme Court of Illinois was filed on September 25, 1942 (R. 55) and judgment entered in that court (R. 62). The opinion is reported in Volume 380 of the Illinois Supreme Court Reports at page 386. The opinion and judgment appear at pages 55 to 62, inclusive, of the transcript of record. By this judgment, the judgment of the Circuit Court of Cook County, confirming the decision of the Industrial Commission, is affirmed, and the case is held to be one under the Workmen's Compensation Act and not under the Federal Employers' Liability Act.

When respondent's application for adjustment of claim was first filed with the Industrial Commission, petitioner herein objected to its allowance on the ground that the Workmen's Compensation Act was not applicable (R. 2), and throughout the proceedings in the courts below petitioner contended that the Federal Act was applicable (R. 3, 17, 30). However, the arbitrator, the Industrial Commission, the Circuit Court of Cook County, and the Supreme Court of Illinois, all held adversely to petitioner's contention (R. 27, 30, 61).

THE QUESTIONS PRESENTED.

1. Is the August 11, 1939 amendment to U. S. Code, Title 45, Section 51, beyond the power of Congress?

2. Was respondent at the time of his injuries under and subject to the provisions of the Federal Employers' Liability Act? If he was, then the Illinois Workmen's Compensation Act was not applicable and the Industrial Commission had no jurisdiction to entertain the application for adjustment of the claim and the award of compensation was improper.

STATUTES INVOLVED.

The case arises under the Federal Employers' Liability Act (U. S. Code, Title 45, Sections 51, et seq.).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Illinois has decided a Federal question of substance not heretofore determined by this court. (U. S. Supreme Court Rule 38, 5(a)).

2. The Supreme Court of Illinois has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court (U. S. Supreme Court Rule 38, 5(a)).

3. The scope and validity of the amendment of August 11, 1939, have been passed upon by other state courts of last resort, each to the contrary of the decision of the Illinois Supreme Court. The facts in the instant case bring it squarely within the provisions of the amendment. The Illinois court holds that to that extent the amendment is unconstitutional.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this court directed to the Supreme Court of Illinois commanding that court to certify and send to this court a transcript of its record and proceedings, and that the judgment of said Supreme Court of Illinois may be reviewed and reversed by this Honorable Court, and that petitioner may have such other and further relief as is proper.

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NELSON J. WILCOX,
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The opinion of the Supreme Court of Illinois appears in Volume 380 at page 386 of the official reports of the Supreme Court of Illinois (44 N. E. (2d) 19).

The jurisdictional grounds upon which review of this case is sought are set forth on pages 3 and 4 of the foregoing petition, and are herein incorporated by reference.

STATEMENT OF THE CASE.

Petitioner is now, and at the time of the accident involved herein was, the Trustee of the property of the Chicago and North Western Railway Company and in such capacity at all times engaged in both interstate and intrastate commerce. In November 1933 respondent entered the service of the Chicago and North Western Railway Company as a patrolman and, with the exception of a short layoff, continued to work for that company, or its trustee, until he was injured on March 11, 1940. His duties were to be performed in various yards of petitioner and required him to look over inbound and outbound interstate and local trains in these yards, patrol his territory, watch for, extinguish and report fires, keep trespassers off, try to apprehend and arrest thieves, watch tracks for obstructions and broken rails, and determine whether cars were sealed (R. 8). If he should find a car (interstate or intrastate) broken open it was his duty to examine the contents to learn whether or not pilferage had occurred, make notations thereof, reseal the car and make a report to his superior officers (R. 9, 27, 28). It was also his duty to inspect passing trains (interstate and intrastate) for hot boxes and other damage. The yards where respondent's duties were performed were for both interstate and intrastate transportation.

On the night of March 11, 1940, respondent was assigned to work in the North Avenue district in Chicago, extending from Clybourn Avenue on the north to Division Street on the south (R. 5, 8). Both main line interstate and side tracks are located in this district (R. 8, 9). Petitioner's railway system extends into and through nine states, namely, Illinois, Iowa, Nebraska, Wyoming, South Dakota, North Dakota, Wisconsin, Michigan and Minnesota (R. 29).

Respondent reported for duty at the North Avenue Yard office at about 5:20 P.M. on the evening of March 11, 1940. A few minutes before 6:00 P.M. respondent left the yard office and started toward Division Street in performance of his regular duties (R. 6). On his way respondent stopped and examined a section shanty, and then proceeded down petitioner's track number 6. In the course of his duties respondent came to a bridge on petitioner's right of way and saw a stranger standing nearby. Respondent, announcing himself to be a police officer, approached this man to ascertain what he was doing on railroad property (R. 6). Thereupon the man tried to strike respondent with a stick or club (R. 7). Respondent disarmed the man and placed him under arrest (R. 7). Shortly thereafter two other men came up on the right of way and grabbed respondent, held his arms and beat him, and finally pushed him off the bridge causing him to fall about twenty feet (R. 7). Respondent was injured by the fall, and because of such injuries filed his claim for compensation (R. 8).

There is no dispute as to the above facts or as to the nature and extent of the injuries.

Hearings on respondent's application for adjustment of claim were had and an award was entered finding that both petitioner and respondent were subject to the terms of the Illinois Workmen's Compensation Act; that the injury arose out of and in the course of his employment; and that

the injury was compensable under that act (R. 30, 57). On certiorari, the Circuit Court of Cook County affirmed the decision of the Industrial Commission (R. 30, 57). The sole question is whether respondent at the time of his injuries was under and subject to the provisions of the Federal Employers' Liability Act. If he was, then the Illinois Workmen's Compensation Act was not applicable, and the Industrial Commission had no jurisdiction to entertain the application for adjustment of the claim and the award of compensation was improper.

ASSIGNMENT OF ERRORS.

1. The Supreme Court of Illinois erred in holding that the August 11, 1939 amendment to Section 51 of the Federal Employers' Liability Act was unconstitutional.

2. The Supreme Court of Illinois erred in holding that respondent at the time of his injuries was not under the Federal Employers' Liability Act

SUMMARY OF ARGUMENT.

I.

Congress may regulate the liability of a carrier for injuries suffered by an employee whose duties are in both interstate and intrastate commerce, regardless of the character of work being performed at the time of accident.

Ill. Cent. R. Co. v. *Behrens*, 233 U. S. 473;
Southern Ry. v. *United States*, 222 U. S. 20;
B. & O. RR. v. *Int. Com. Com.*, 221 U. S. 612;
Texas & Pacific Ry. v. *Rigsby*, 241 U. S. 33;
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601;
Kirschbaum v. *Walling*, 316 U. S. 517;
U. S. v. *Wrightwood Dairy Co.*, 315 U. S. 110;
Wickard v. *Filburn*, ... U. S. .... 87 L. Ed. (adv. opin.) 57;
Second Employers Liability Cases, 223 U. S. 1.

II.

The courts should not by a strained construction override the clear intent of a statute, but should rather decide questions in accordance with the views expressed by Congress.

Title 45, U.S.C.A., Sec. 51.

Senate Committee on Judiciary Report — 76th Congress.

III.

To sustain the purpose of the 1939 amendment, no previous decision of this court will have to be overruled.

Howard v. *Ill. Cent. R. Co.*, 207 U. S. 463;

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1;

Ill. Cent. R. Co. v. *Behrens*, 233 U. S. 473;

Graves v. *New York ex rel. O'Keefe*, 306 U. S. 466.

IV.

The 1939 amendment is clearly applicable to the case at bar.

Kinzell v. *C. M. & St. P. Ry. Co.*, 250 U. S. 130;

Pecos & Northern Ry. Co. v. *Rosenbloom*, 240 U. S. 439;

Missouri Pacific R. R. v. *David*, 284 U. S. 460;

Philadelphia & Reading R. Co. v. *DiDonato*, 256 U. S. 327;

Wheelock v. *Industrial Com.*, 318 Ill. 537.

V.

All other decisions on the subject since the 1939 amendment have given effect to its obvious purpose. To secure uniform application of the act this court should pass on this case.

Southern Pacific v. *Industrial Acc. Com.*, 120 Pac. (2d) 880 (Cal.);
Louisville & Nashville R. R. Co. v. *Plotts*, 158 S. W. (2d) 729 (Tenn.);
Piggue v. *Baldwin*, 121 Pac. (2d) 183 (Kan.);
Ermin v. *Pa. R. R. Co.*, 36 Fed. Supp. 936;
Wright v. *New York Central R. R. Co.*, 33 N. Y. Supp. (2d) 531;
N. Y. C. R. R. v. *Winfield*, 244 U. S. 147.

VI.

Even without the 1939 amendment respondent was governed by the Federal Employers' Liability Act.

Roberts Federal Liabilities of Carriers, Sec. 754;
Erie v. *Winfield*, 244 U. S. 170;
Erie v. *Welsh*, 242 U. S. 303,
Nor. Car. R. R. Co. v. *Zachary*, 232 U. S. 248;
N. Y. C. R. R. Co. v. *Marcone*, 281 U. S. 345, 350;
Rader v. *B. & O. R. Co.*, 108 F. (2d) 980;
MacLemale v. *N. Y. C. R. R. Co.*, 300 N. Y. S. 68;
Cullen v. *Erie R. Co.*, 267 N. Y. S. 837;
Elder v. *Penn. R. Co.*, 180 Atl. 183 (Pa. Supr.);
Nichols v. *St. L. & S. F. R. Co.*, 151 So. 347 (Ala.);
Bordelon v. *New Orleans Term.*, 129 So. 452 (La.);
Cork v. *Lehigh Valley R. Co.*, 119 Atl. 88 (N. J.);
Fitzgerald v. *Gt. Northern Ry. Co.*, 196 N. W. 657 (Minn.);
A. T. & S. F. Ry. Co. v. *Ind. Acc. Comm.*, 220 Pac. 342 (Cal.);

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Dade v. *N. Y. C. R. Co.*, 206 N. Y. S. 519;
Anest v. *Columbia & P. S. Co.*, 154 Pac. 1100 (Wash.);
Mulcahy v. *Terminal R. R.*, 123 S. W. (2d) 235 (Mo.);
Jordan v. *Erie R. R.*, Atl. (2d) 116 (Pa. Supr.);
Jennings v. *Pittsburgh & L. E. R. Co.*, 7 Atl. (2d) 96 (Pa. Supr.).

ARGUMENT.

I.

Congress may regulate the liability of a carrier for injuries suffered by an employee whose duties are in both interstate and intrastate commerce, regardless of the character of work being performed at the time of accident.

The decision of the Supreme Court of Illinois is based on the proposition that Congress acted beyond its powers in passing the August 11, 1939, amendment to Section 51, Title 45, U. S. Code, when it extended the Federal Employers' Liability Act to include employees of an interstate carrier where the duties of the employees were both interstate and intrastate, but where the act which was performed at the time of the accident was intrastate. In other words, the Supreme Court of Illinois has said in effect that the power of Congress over commerce so far as an employee is concerned is constitutionally limited to instances where the employee at the time of accident is doing interstate work; that it makes no difference that an injury to an employee may prevent him in the next moment from performing a duty vital to interstate commerce; and that such inability of the employee to perform an act of interstate commerce does not affect interstate commerce.

There is no restriction on the power of Congress over interstate commerce, and in numerous cases decided by this court it has been held that Congress has the power to regulate intrastate commerce which affects interstate commerce. We cite only a few of the many cases establishing this principle.

In *Ill. Cent. R. Co.* v. *Behrens*, 233 U. S. 473, it was held that an employee of an interstate carrier engaged at the time of injury in moving cars solely in intrastate commerce was not engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908. This court

was careful to point out, however, that had Congress so desired it could have extended the application of the Federal Employers' Liability Act to employees who were engaged in part in interstate commerce whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. The court said at page 477:

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation of Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

Southern Ry. v. *United States*, 222 U. S. 20, involved a civil action to recover penalties for violation of the Safety Appliance Act. The defendant railroad had hauled five cars with defective couplers. Two of the cars were used at the time in moving interstate traffic and the other three were in intrastate traffic. It did not appear that the use of these three cars was in connection with the two cars in interstate commerce. The defendant contended that the Act was not intended to apply to purely intrastate hauling, although on a railroad which was engaging in interstate commerce. Defendant also contended that if the intent of the act was to apply to cars purely in intrastate commerce, the act would be unconstitutional. This court held that both of defendant's contentions were without merit, and that where both intrastate and interstate transportation are carried

by the same railroad the two classes of transportation are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains.

In *B. & O. RR.* v. *Int. Com. Com.*, 221 U. S. 612, an injunction was asked requiring defendant to make monthly reports showing overtime worked by its employes subject to the Act of Congress regulating hours of labor. The Act by its terms applied only to carriers and employees engaged in interstate transportation. It was argued by defendant that interstate and intrastate operations of interstate carriers were so interwoven that it was impracticable to divide their employees in such manner that the duties of those engaged in interstate commerce only, would be affected and that many employees were engaged in both classes of transportation. This court held that Congress had the power to limit hours of labor of employees engaged in interstate transportation and that this power could not be defeated because of the duties of some of the employees related to both interstate and intrastate operations.

In *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, plaintiff sued defendant railroad company to recover damages sustained by reason of defective appliances in violation of the Federal Safety Appliance Act. At the time the employee was enjured he was not engaged in interstate commerce. The question involved was whether it was beyond the power of Congress under the commerce clause of the Constitution by the passage of the Safety Appliance Act to create a liability in favor of one not employed in interstate commerce. This court held at page 42 of the opinion that "the right of private action by an employee injured while engaged in duties unconnected with interstate commerce,

but injured through a defect in a safety appliance required by the Act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject."

In *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, the question arose as to whether the National Labor Relations Board had a right to enjoin unfair labor practices under the National Labor Relations Act where the employer involved was not himself engaged in interstate commerce. This court held the employer was subject to the act and pointed out that it has been frequently held by this court that the power of Congress extends to the protection of interstate commerce from interference or injury to activities which are wholly intrastate.

In *Kirschbaum* v. *Walling*, 316 U. S. 517, decided by this court on June 1, 1942, the question arose under the Fair Labor Standards Act of 1938, as to whether an employer could be required to pay minimum wages on the ground that his employees were engaged in interstate commerce. A section of the Federal Act involved provided that for the purposes of the act an employee should have been deemed to have been engaged in interstate commerce if such employee was employed in any process or occupation necessary to the production thereof in any state. The employees in question were engaged in the operation and maintenance of a loft building which was rented by the owner to tenants who produce goods for interstate commerce. It was held that the Fair Labor Standards Act extended to such employees because they were engaged in interstate commerce. This court pointed out that the expansion of our industrial economy has inevitably been reflected in the extension of federal authority previously possessed by the states; that in the past Congress has frequently chosen to regulate

only part of what it constitutionally might regulate, leaving to the states activities which, if isolated, were only local; and that the history of Congressional control over various phases of interstate commerce has been continuously extended. Various examples of such extension are given in the opinion, and one of such examples of extension of federal control is the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that act to employees any part of whose duties shall in any way directly or closely and substantially affect interstate commerce.

In *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110, at p. 119, this court said:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. * * * The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its fullest extent, and acknowledges no limitations other than are prescribed by the Constitution."

In *Wickard* v. *Filburn*, ... U. S. ...., 87 L. Ed. (Adv. Opn.) 57, decided by this court on November 9, 1942, this court said:

> "But even if appellant's activity be local and though it may not be regarded as commerce it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this is irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "

On the reasoning contained in the foregoing authorities Congress competently may say that where an employee is engaged in both interstate and intrastate transportation his injury or death in a purely intrastate transaction affects interstate commerce. The close relationship of interstate and intrastate commerce was discussed by this court in the *Second Employers' Liability Cases,* 223 U. S. 1. On page 48 of the opinion in that case, this court said:

> "As is well said in the brief prepared by the late Solicitor General: 'Interstate commerce—if not always, at any rate when the commerce is transportation —is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly, or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.' "

II.

The courts should not by a strained construction override the clear intent of a statute, but should rather decide questions in accordance with the views expressed by Congress.

The language of the August 11, 1939, amendment clearly and explicitly provides that the Federal Employers' Liability Act shall be applicable to any employee of a carrier any part of whose duties shall be in furtherance of interstate commerce, or shall in any way directly or closely and substantially affect such commerce. (Amendment set forth on page 3 of petition above.)

That there can be no doubt about the intent of Congress in passing the amendment is shown by the report of the Committee on the Judiciary of the United States Senate, 76th Congress, 1st Session (Committee Report No. 661, upon S. 1708), which states the following:

> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.
>
> The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury 'in transportation or work so closely related to it as to be practically a part of it' (*Shanks* v. *D. L. & W. R. R.*, 239 U. S. 556).
>
> In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car

upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then enroute in an interstate movement.

As a result of the uncertainty which exists in border-line cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had. * * *

The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

In spite of the clear wording of the act and of the Senate Committee Report, the Supreme Court of Illinois in this case has completely vitiated the amendment by a strained construction of its language. The interpretation given the amendment by the Supreme Court of Illinois is found in the following language in the opinion (R. 60):

"* * * the amendment in so far as it attempts to include the employees of interstate carriers at all times, regardless of whether or not their immediate employment is in interstate commerce or affects such commerce, is beyond the powers of Congress. On the other hand, the provisions of the 1939 amendment which broaden the application of the act to include those employees whose employment 'in any way directly or closely and substantially' affects interstate commerce, are within the powers of Congress and constitute a valid enactment.

Viewed from this basis, the only effect of the 1939 amendment is to change the test which must be applied to determine whether or not the Federal Employers' Liability act is applicable. Prior to that amendment, the test has been whether the employee, *at the time of accident,* was engaged in interstate commerce, or in work so closely related to it as to become a part of it. (*Thomson* v. *Industrial Com.*, 372 Ill. 258). Under the amendment, the test must be whether the activity in which the employee is engaged *at the time of the accident,* directly or closely and substantially affects interstate commerce." (Italics ours.)

The Supreme Court of Illinois thus says that both before and after the amendment of August 11, 1939, the only time to be considered is the time of the accident; that before the amendment the question was whether the employee's work was interstate "or so closely related to interstate commerce as to become a part of it;" but that after the amendment the question is whether the employee's work "directly or closely and substantially affects interstate commerce" (R. 60). Such an interpretation of the 1939 amendment means that absolutely nothing was accomplished by the enactment of the law.

It is too well settled to require citation of authority that the provisions of a statute must be given effect and up-

held by the courts, unless they are shown to be plainly, manifestly and unequivocally in conflict with some constitutional provision. No such showing appears here.

III.

To sustain the purpose of the 1939 amendment, no previous decision of this court will have to be overruled.

The Supreme Court of Illinois in this case has held that the plain meaning of the 1939 amendment cannot be given effect without overruling *Howard* v. *Ill. Cent. R. Co.*, 207 U. S. 463, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. This is not true. Six years after the decision in the *Howard* case, in *Illinois Cent. Ry.* v. *Behrens*, 233 U. S. 473, 477, this court held

> "* * * that the liability of the carrier for injuries suffered by a member of a crew in the course of its general work was subject to regulation of Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

In commenting on the *Howard* case, on page 477 of the *Behrens* opinion, this court stated that the basis of the *Howard* case decision was that the Employers' Liability Act there pronounced invalid "attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employee, even though his employment had no connection whatever with interstate commerce."

Even had the *Howard* case announced a limitation on the power of Congress over commerce that decision should not now bind this court. The source of the power of Congress over commerce is to be found in the language of the Constitution and not in the language of what the court may have said about the Constitution. As said by Mr. Justice

Frankfurter in his concurring opinion in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, at page 491, wherein this court overruled previous decisions sustaining the immunity from Federal income tax of salaries received by state officers:

> "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

The *Jones-Laughlin* case also cited by the Supreme Court of Illinois as authority against sustaining the 1939 amendment is actually in support of its validity. In that case this court recognized the distinction between interstate commerce and intrastate commerce, but in upholding the National Labor Relations Act, on page 37 of the opinion, said:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

IV.

The 1939 amendment is clearly applicable to the case at bar.

In *Kinzell* v. *C. M. & St. P. Ry. Co.*, 250 U. S. 130, this court adopted the following test to determine what kind

of a duty is sufficient to bring an employee under the Federal Employers' Liability Act:

> "Was its performance a matter of indifference so far as that commerce (interstate) was concerned, or was it in the nature of a duty resting upon the carrier?"

Certainly it cannot be said that respondent's duties of guarding interstate shipments, looking for hot boxes on interstate trains, watching for broken rails used by interstate trains, and checking and resealing interstate cars which had been broken into were matters of indifference to interstate commerce.

In *Pecos & Northern Ry. Co.* v. *Rosenbloom,* 240 U. S. 439, this court held that an employee was under the Federal Employers' Liability Act where his duties were to preserve a record of the numbers of outgoing freight cars and to seal those which needed it, where a portion of such cars were in intrastate commerce and the balance were in interstate commerce.

In the case of *Missouri Pacific R. R.* v. *David,* 284 U. S. 460, an employee was engaged in guarding interstate freight shipments from robbery and theft, and met his death while so engaged. The suit was under the Federal Employers' Liability Act. That it was correctly brought under the Federal Act was not questioned and the case was considered and determined in this court upon the merits with the conclusion that no recovery could be had by reason of the doctrine of assumption of risk. As to whether the work which the employee was doing was related to interstate commerce and therefore within the Federal statute was, of course, at the threshold of the case and its consideration upon the merits is sufficient to disclose that this court merely and as a matter of course assumed that it was so related.

In *Philadelphia and Reading R. Co.* v. *DiDonato,* 256 U. S. 327, this court held that a watchman employed by a carrier at a crossing over which both interstate and intrastate trains passed was in interstate commerce, although the train by which he was struck was intrastate. The basis of the decision was that,

> "The service of a flagman concerns the safety of both commerces and to separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies."

In *Wheelock* v. *Industrial Com.,* 318 Ill. 537, it was held that a police sergeant employed by a railroad to watch shipments of freight out of certain cities riding whatever trains he was advised by his superior officers to ride for a certain distance out of the city was in interstate commerce where it was his duty to guard the freight, regardless of whether interstate or intrastate destination. The fact that when injured he was guarding an intrastate shipment did not remove him from the Federal Employers' Liability Act. The court said:

> "It is the employment that determines whether or not the injury to the employee is within the purview of the act and not necessarily the particular act of the employee at the precise time of his injury."

V.

All other decisions on the subject since the 1939 amendment have given effect to its obvious purpose. To secure uniform application of the act this court should pass on this case.

In *Southern Pacific* v. *Industrial Acc. Com.,* 120 Pac. (2d) 880 (Cal.), the constitutionality of the 1939 amendment to the Federal Employers' Liability Act was sustained. At page 885 that court said:

"* * * the respondent contends the amendment as so construed covers in part intrastate business, a subject over which the Congress has no jurisdiction. The point is not well taken. If and when interstate business is clearly a part of the subject to be legislated on, the fact that intrastate commerce may be interwoven therewith does not prevent the Congress from exercising its powers." (Citing authorities.)

In *Louisville & Nashville R. R. Co.* v. *Plotts*, 158 S. W. (2d) 729 (Tenn.), the Court gave effect to the 1939 amendment to the Federal Employers' Liability Act. There, a fireman on a switch engine was injured when the engine was moving cars in intrastate transportation. The ordinary duties of the train crew of which the injured man was a member were the general switching of cars in both interstate and intrastate shipments. The court said (p. 730):

"The amendment of August 11, 1939, evidences a legislative intent of the congress to extend the Federal Employers' Liability Act to all railroad employees whose duties pertain to the furtherance of interstate or foreign commerce, or which in any way directly or closely and substantially affect such commerce. Prior to the amendment, it was often a matter of difficulty for an injured employee to know, and for the courts to ascertain, whether or not at the time of the accident he was engaged in interstate commerce. One moment the employee might be engaged in an interstate movement, and the next moment in an intrastate movement."

In *Piggue* v. *Baldwin*, 121 Pac. (2d) 183 (Kansas), the employee at the time he was killed had the general duty of cleaning cinders, papers and debris from the tracks of the respondent railroad company. At the moment of his death he was removing a pile of cinders from respondent's receiving track. The court said (p. 186):

"Under the amendment to the Federal Employers' Liability Act any employee of a carrier, any part of whose duties shall be the furtherance of interstate commerce, or shall in any way directly or closely and substantially affect such commerce, is considered as employed by such carrier in interstate commerce and is entitled to the benefits of the Act. Clearly claimant's husband was covered by the provisions of the Federal Employers' Liability Act as amended."

In *Ermin* v. *Pa. R. R. Co.*, 36 Fed. Supp. 936 (D. C., N. Y.), at page 940, the court said:

"There are multitudinous decisions raising hair-splitting interpretations as to whether or not the employe at the time of his accident was actually engaged in interstate commerce. It was to avoid this difficulty that Congress enacted the amendment. It was, undoubtedly, the intent of Congress to include within the scope of the Federal Employers' Liability Act all employees, even those performing intrastate services whose employment meets the requirements of the Act. It is no longer subject to doubt that Congress had the power to include intrastate employment, which affects interstate commerce, within the scope of the Federal Employers' Liability Act. (Citing authorities.)

The Court should not by a strained construction override the intent of the Congress but should rather decide questions in accordance with the views expressed by the Congress. Here the Congress was trying to remedy a fault, it was enacting legislation which would not require a railroad employee to draw a hairline to determine whether or not at the moment of the accident he was actually engaged in interstate commerce. The Congress was correcting an evil which existed which prevented railroad employees from receiving a just determination of their rights."

In *Wright* v. *New York Central R. R. Co.* 33 N. Y. Supp. (2d) 531, the court said:

"Previous to August 11, 1939, the nature of the work in which an interstate carrier's employee was engaged at the time of his injury or death determined whether the Federal Employers' Liability Act, 45 U.S.C.A. §51 *et seq.*, applied and he was entitled to its benefits. *Shanks* v. *Delaware, L. & W. R. R.*, 239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436, L.R.A. 1916C, 797. And there were many borderline decisions under the rule. A case would turn upon some slight differentiation in duty or operation, more apparent than real. There was much hair splitting and little certainty. It was to avoid all this and to give a fixity of application that Congress amended this act on August 11, 1939, to include 'any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce.' "

From the foregoing, it is apparent that there is a square conflict of authority on the effect of the 1939 amendment, the Supreme Court of Illinois refusing to recognize it and all other jurisdictions upholding it.

Although not a matter of record in this case, the court should, we think, take judicial notice of the fact that the State boards charged with the duty of administering local compensation acts are being constantly called upon to decide whether injured railroad employees come within the Employers' Liability Act, and that attorneys for injured employees as well as railroad law and claim departments are daily called upon to decide the same question. Uniformity as to the interpretation, applicability and constitutionality of the Amendment of 1939 is urgently necessary. Without it an utterly deplorable situation exists. No better illustration can be found than in the situation in the case at bar. The railroad here involved operates in nine States, all but one of which have Workmen's Compensation Acts administered by State boards. Unless this court passes on the effect of the amendment, the rights of injured employees

of petitioner will depend on which side of a State line an accident occurred and not on the provisions of the Federal Act.

In *N. Y. C. R. R.* v. *Winfield*, 244 U. S. 147, it was held that where state court decisions under the Federal Employers' Liability Act are conflicting, the Supreme Court of the United States should decide the matter so that there may be uniformity. In the *Winfield* case this court granted a review of the decision of the Supreme Court, Appellate Division of the State of New York, allowing an award under the Workmen's Compensation Act. This court pointed out that the state courts' decisions on the point were conflicting, New York and the New Jersey state courts holding one way, and the California Appellate Court and the Illinois Supreme Court holding the opposite. This court said, at page 149 of the opinion:

> "Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, 378-379."

VI.

Even without the 1939 amendment respondent was governed by the Federal Employers' Liability Act.

Roberts, Federal Liabilities of Carriers Section 754, states:

> "The actual policing of trains, to the end that passengers shall not be molested or property in transit damaged or stolen, was and still is a function of the trainmen, and a part of the act of carriage. It is none

the less so when the multiplication of a carrier's responsibilities induces it to supplement this watchfulness of the train crew by placing on trains and in yards men whose sole duty it is to discharge this police duty. Hence, men so employed are definitely participating in the movement of traffic, and if such traffic is interstate in character, they are under the Federal Employers' Liability Act. The same is true as to a watchman guarding an interstate car or a car containing interstate shipments standing in the yards awaiting further movement, or one guarding interstate shipments which are awaiting loading or are being held, after unloading, for delivery to the consignee."

Even before the 1939 amendment it was well established that a service being rendered by an employe at the time of his injury might have a double aspect toward commerce. As in the case of *Erie* v. *Winfield,* 244 U. S. 170, the service may clearly be a service in interstate commerce, yet at the same time it may be in furtherance of local commerce or of purposes not directly related to commerce of any sort. In the *Winfield* case the employee was killed leaving the carrier's yards at the close of the day's work. This court held that like the employee's trip through the yards to the engine in the morning, his return trip was a necessary incident of his day's work and partook of the character of the day's work as a whole, and that it was no more an incident of one part than of another; that since his day's work was in both interstate and intrastate commerce, when the employee was leaving the yards at the time of his injury, his employment was in both; and that Federal law being paramount, he was under the Federal Employers' Liability Statute.

In *Erie* v. *Welsh,* 242 U. S. 303, a yard conductor was injured at a time when the specific act he was doing was devoid of any character as to commerce. It was there held that the proper test was whether the series of acts last per-

formed was properly to be regarded as a succession of separate tasks or as a single and indivisible task.

In *Nor. Car. R. R. Co.* v. *Zachary*, 232 U. S. 248, this court held that although absent temporarily from his train for a purpose not inconsistent with his duty to his employer, a railroad employee was still engaged in interstate commerce within the meaning of the Employers' Liability Act. This case was cited with approval and followed in *N. Y. C. R. R. Co.* v. *Marcone*, 281 U. S. 345, 350. To the same effect is *Rader* v. *B. & O. R. Co.*, 108 Fed. (2d) 980 (C. C. A. 7th).

The following state court decisions hold that employees acting as policemen, watchmen or inspectors at yards where interstate commerce is being carried on are in interstate commerce:

Policemen.

MacLemale v. *N. Y. C. R. R. Co.*, 300 N. Y. S. 68.
Cullen v. *Erie R. Co.*, 267 N. Y. S. 837.
Elder v. *Penn. R. Co.*, 180 Atl. 183 (Pa. Supr.).
Nichols v. *St. L. & S. F. R. Co.*, 151 So. 347 (Ala.).
Bordelon v. *New Orleans Term.*, 129 So. 452 (La.).

Watchmen.

Cork v. *Lehigh Valley R. Co.*, 119 Atl. 88 (N. J.).
Fitzgerald v. *Gt. Northern Ry. Co.*, 196 N. W. 657 (Minn.).
A. T. & S. F. Ry. Co. v. *Ind. Acc. Com.*, 220 Pac. 342 (Cal.).
Smith v. *Ind. Acc. Com.*, 147 Pac. 600 (Cal. A.).
Dade v. *N. Y. C. R. Co.*, 206 N. Y. S. 519.

Inspectors.

Anest v. *Columbia & P. S. Co.*, 154 Pac. 1100 (Wash.).
Mulcahy v. *Terminal R. R.*, 123 S. W. (2d) 235 (Mo.).
Jordan v. *Erie R. R.*, 22 Atl. (2d) 116 (Pa. Supr.).
Jennings v. *Pittsburgh & L. E. R. Co.*, 7 Atl. (2d) 96 (Pa. Supr.).

CONCLUSION.

What was said in *Phila. & Reading Co.* v. *DiDonato*, 256 U. S. 327, in discussing the question of whether or not particular acts of an employee brought him under the Federal Employers' Liability Act is here applicable. On page 331 of that opinion this court said:

> "Therefore, whether they be of state or congressional power, there is an equal necessity for their accurate delimitation. This case, therefore, has importance beyond the interest of the parties to it. Its principle and example, reinforcing the *Pederson Case* and the cases based upon it, make a test by which future cases may be assigned to intrastate or interstate commerce and mark the power and policies that may be necessary or convenient to either."

We respectfully submit that whether or not the 1939 amendment shall be given effect is a matter of vital importance to the public. This question should now be authoritatively decided by this court so that uniform effect may be given to the act by the various courts throughout the United States.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
JAN 14 1943
CHARLES ELMORE CROPLEY

In The

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1942

No. 577

CHARLES M. THOMSON, Trustee of the Property of CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS (Herman E. Stoll),

Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND SUPPORTING BRIEF

MARSHALL SOLBERG

GERALD T. WILEY,

Counsel for Respondent.

In the

SUPREME COURT OF THE UNITED STATES

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No. 577

CHARLES M. THOMSON, Trustee of the Property of CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

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INDUSTRIAL COMMISSION OF ILLINOIS (Herman E. Stoll),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

Herman E. Stoll, respondent to the petition for writ of certiorari herein, respectfully shows to this Honorable Court:

THE MATTER INVOLVED

We cannot agree with Counsel's statement of the matter involved. Assuming that statement to be true in all other respects, the position of the Supreme Court of Illinois, when deciding this case, has not been correctly stated and is not at variance with applicable decisions of this Court. Counsel quotes the Illinois Court as holding that "the Employers' Liability Act is applicable only in cases where the employer is at the very time of his injury performing a duty

in furtherance of interstate commerce; that any other interpretation of the language of the amendment of August 11, 1939, would result in such amendment being 'beyond the powers of Congress'."

Actually, what the Court said was that "the amendment in so far as it attempts to include the employees of interstate carriers at all times, regardless of whether or not their immediate employment is in interstate commerce or affects such commerce, is beyond the powers of Congress. On the other hand, the provisions of the 1939 amendment which broaden the application of the act to include those employees whose employment 'in any way directly or closely and substantially' affects interstate commerce, are within the powers of Congress and constitute a valid enactment."

ADDITIONAL STATEMENT OF THE CASE

Counsel for Petitioner have with fair accuracy stated the portions of the record involved in the present phase of this matter. However, because the injuries of the Respondent Stoll were not (as indeed they could not be) disputed, his horrible and permanent mutilation is not set forth.

SUMMARY OF ARGUMENT

I RESPONDENT WAS NOT WITHIN THE 1939 AMENDMENT OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

Much of Petitioners' argument and many of his statements as to the powers of Congress to regulate interstate commerce

may be admitted without giving cause to this Court to review the four decisions so far rendered in Respondent's favor. Reduced to its proper proportion, this case presents only one factual question: Was Respondent "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth...?"

Respondent was a patrolman. He worked only in Chicago. He was empowered to make arrests, and it was in the course of his making such an arrest that he was injured.

For what was he making the arrest? For a violation of a Federal Statute? The man whom he was taking into custody was trespassing--trespassing on the premises of his employer, and thus violating a statute, not of the United States, but of the State, and probably a city ordinance as well.

Counsel surely cannot argue that such a trespass would constitute only an offense against interstate commerce. That argument, carried to its logical conclusion, would imply that Congress had the power to declare that all offenses against the properties and rights of way of interstate carriers should be regarded as Federal crimes only, to the exclusion of State criminal laws.

His duties were the protection of property. They were preventive only; nowhere is there any evidence to show that he was engaged at any time in any duties pertaining to interstate commerce, or in furtherance of interstate commerce.

Stoll has been described in the evidence and in counsel's petition as a 'patrolman.' It was shown that he walked a beat within a small area in the City of Chicago (Tr. 8). He had nothing to do with the operation of trains, the forwarding of freight or the carrying of passengers. He merely protected the property of his employer against thefts and trespasses--violations of local laws and ordinances.

Counsel seek to extend the operation of the Federal act to the point where every employee of a railroad which runs between two states would be subject to that act. To do so would exclude exertion of an existing and satisfactory State law, bringing about an effect never intended by Congress. It was held in Boston and Me. Railroad vs. Armburg, 285 U. S. 234, that the Federal Employers' Liability Act does not exclude exertion of State power over employees of interstate carriers while engaged in services not involving interstate commerce. Such employees are controlled by the State law.

That Stoll's duties were of a purely local nature is shown by the evidence. Recounting the occurrence in which he received his horrible injuries, he testified: 'I approached him as a police officer and showed him my badge...I showed him my star, and said 'Police Officer'...I told him to come along as I wanted to lock him up.' (Tr. 6-7) 'I worked for the Chicago and North Western Railway as a patrolman for about three years and this was my regular assignment. My duties as a patrolman were to protect the right of way from thieves, hitchhikers, trespassers, and so forth, inspect

cars in the yards and if we find a seal missing we put on our police seal and make a report to the office." (Tr. 8)

And Charles J. Slater, special agent for the railroad who employed Stoll testified: "We do police work in general and if there is a robbery we try to apprehend the robbers." (Tr. 28)

Thus we have a respondent whose work was purely local in character and whose duties cannot be said to be the furtherance of interstate commerce or directly or closely and substantially affecting such commerce. It was that which the Supreme Court of Illinois and the inferior courts and tribunals have held, and there is nothing in that finding which is not in accord with applicable decisions of this Court.

It will be noted that in the list of cases holding policemen, watchmen or inspectors at railroad yards where both interstate and intrastate commerce is being carried on to be in interstate commerce, no Federal cases are cited.

Counsel lay great stress in their petition upon the views expressed by Congress in adopting the legislation, and quote from the report of the Committee on the Judiciary of the United States Senate. Among the objects set forth there is the elimination of the possibility of a claimant finding, too late, that he had sued in the wrong court, during the acquirement of this information and being barred from recovery under any other law.

The reversing of this case would do just that. Counsel

is attempting, under the guise of seeking a decision on the amendment to the Act, to prevent Stoll from recovering anything whatever for his very severe injuries and for the long period of convalescence and unemployment which still pertain. Had Stoll brought his action under the Federal Employers' Liability Act, would not counsel have maintained that he had chosen the wrong forum, and that he should have brought his action before the Industrial Commission of the State? We believe they would.

Should Stoll be in this case denied his right to recover, his only recourse is denied him. Should he be required to proceed under the Federal Employers' Liability Act, which he probably could not do because of the length of time since his injury, he would be required to prove negligence on the part of his employer. And Stoll, although engaged in a dangerous calling, obviously could not prove that the railroad was negligent in permitting or making it possible for three ruffians to set upon him and beat him nearly to death.

Even assuming, which we do not, that the law would be benefited by some clarification, this is not a proper case in which to consider the question.

Nor would a determination by this Court of the question here presented clarify for all time the application of the Amendment to the Act. It would settle only this case, for there remains in every other law suit a different set of facts, in each of which those facts must be weighed in the light of the amendment. This court has acknowledged that problem in the case of Industrial Accident Commission of the State of California

vs. Davis, 259 U. S. 182. In that case Davis was injured while working in the repair shops of the railway company on an engine that had been exclusively employed in interstate commerce, which engine after being repaired was returned to interstate service. The California District Court of Appeals held that the sole question presented was whether the engine at the time of the accident was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and concluded that the employee's work was "so intimately connected with interstate commerce as practically to be a part of it and, therefore, the Industrial Commission had no Jurisdiction." The Supreme Court of the United States reversed the California courts. (Ind. Acc. Com. vs. Davis, supra.)

In considering the difficulties presented by such a case, the Court said, "The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement,--indeed, are necessary to it; but so are all attached to the railroad company,--official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees."

But if this Court is to consider the question of the constitutionality and application of the 1939 amendment, we can do

no better in stating Respondent's position than to follow the reasoning and language of the Supreme Court of Illinois. After reviewing the history of the legislation on this subject and quoting the amendment the Court says:

> "Plaintiff in error contends that the effect of this amendment was to extend the act to include all employees of an interstate carrier, under the terms of the act, so long as any part of their duties is associated with interstate commerce. With this interpretation we cannot agree. Taken literally, it would mean that Congress, by arbitrarily defining any act as interstate commerce, could bring that act within the scope of Federal regulatory power. Congress cannot, under the guise of regulation of interstate commerce, exercise powers not intrusted to it by the constitution. United States v. Ohio Oil Co., 234 U.S. 548, 58 L. ed 1459; Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855.
>
> In recent years the powers of Congress to regulate industry, for the purpose of furthering interstate commerce, have been greatly extended by judicial construction. Although Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat 1, 196, 6 L. ed. 23, 70, defined the authority of Congress over interstate commerce as "plenary," and subject to "no limitations other than are prescribed in the constitution," nevertheless for many years it was generally conceded that the exercise of that authority was limited to the control of acts which, in themselves, actually constituted a part of interstate commerce.
>
> Gradually, as the methods of business and commerce changed, it was recognized that many transactions which do not, in themselves, reach across State lines, are nevertheless so closely and inseparably interwoven with interstate operations as to substantially affect such commerce. From this, to the recognition of the power of Congress to regulate those businesses which substantially affect interstate commerce, was but a step, and the United States Supreme Court has taken that step. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615; Board of Trade v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839.
>
> The extension of Federal control has not, however, destroyed the constitutional limitations on the power of Congress. Notwithstanding the modern trend has been to give to all constitutional limitations a flexibility which renders restrictions practically innocuous, the constitution still exists. It is binding on this court

as well as on the Congress of the United States. Congress is still powerless to regulate matters which are wholly intrastate. As said in the Jones & Laughlin case, supra, 'The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

What, then, is the effect of the 1939 amendment? It seems clear that until Howard v. Illinois Central Railroad Co. supra, and the Jones & Laughlin case, supra, are overruled, the amendment in so far as it attempts to include the employees of interstate carriers at all times, regardless of whether or not their immediate employment is in interstate commerce or affects such commerce, is beyond the powers of Congress. On the other hand, the provisions of the 1939 amendment which broaden the application of the act to include those employees whose employment 'in any way directly or closely and substantially' affects interstate commerce, are within the powers of Congress and constitute a valid enactment.

Viewed from this basis, the only effect of the 1939 amendment is to change the test which must be applied to determine whether or not the Federal Employers' Liability act is applicable. Prior to that amendment, the test has been whether the employee, at the time of the accident, was engaged in interstate commerce, or in work so closely related to it as to become a part of it. (Thomson v. Industrial Com., 372 Ill. 288.) Under the amendment, the test must be whether the activity in which the employee is engaged at the time of the accident, directly or closely and substantially affects interstate commerce.'

We think a further quotation from the Jones and Laughlin case is apropos:

'Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control, A.L.A. Schechter Poultry Corp. v. U. S., supra. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized

government. Id. The question is necessarily one of degree."

Analogous cases have been decided by the Supreme Court of Alabama. In Southern Railway Company vs. Brown, 134 So. 643, it was held by the Supreme Court of Alabama that proceedings to recover compensation for the death of a railroad policeman, shot, by a person arrested, while patroling for brass thieves, bore no direct causal relation to interstate commerce, and the Court also stated that the cars which had been engaged in interstate commerce but had been placed for unloading were not thereafter as affecting the railroad policeman's acts engaged in interstate commerce. The Railroad, in the instant case, admitted that some of the coal in question in this case remained in the cars that had been placed on the sidetrack or switchtrack of the consignee which had its coal yards immediately adjacent to the railroad tracks.

In Sou. Ry vs. Varnell, 131 So. 903, the Supreme Court of Alabama held that a yard policeman, who arrested two hobos on a train which included both intrastate and interstate cars, and thereafter while searching these hobos at the station some distance off, still on the railroad premises, was shot by one of these hobos and subsequently died, that there was no showing that the policeman's doings were connected with or contributed to the operation of trains, but were merely that of a local policeman and in no way connected with making up or operating trains, or of doing work by giving signals, or aiding directly or indirectly in the formation or movement of the same. Therefore, the Court

held that the proceedings under the Workmen's Compensation Act were properly laid, and that the Federal Employers' Liability Act did not apply.

CONCLUSION

We respectfully submit that this is not a proper case for the granting of a writ of Certiorari and that should such a writ be granted, the logic and reasoning of the Supreme Court of Illinois should be followed by this Honorable Court.

Respectfully submitted,

Marshall Solberg

Gerald T. Wiley
Counsel for Respondent

Paul E. Johnson
Of Counsel

(19)

JAN 20 1943
CHARLES ELMORE CROPLEY
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 577

CHARLES M. THOMSON, Trustee of the Property of CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS (Herman E. Stoll),

Respondent.

REPLY BRIEF.

WILLIAM T. FARICY,
WELDON A. DAYTON,
Counsel for Petitioner.

NELSON J. WILCOX,
DRENNAN J. SLATER,
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REPLY BRIEF.

Since our petition for writ of certiorari was filed in this Court there has been published a very recent decision of the Seventh Circuit Court of Appeals rendered November 23, 1942. This is the case of *Edwards* v. *Baltimore & O. R. Co.*, 131 Fed. (2d) 366, where a mechanic's helper was injured while repairing an automatic stoker of a locomotive that had been used in interstate commerce but at the time of the accident was not in actual use. It was to be returned to service only after the

stoker was repaired. A recovery was had in the trial court and on appeal the judgment for plaintiff was affirmed. It was held that plaintiff while engaged in repairing and fitting the engine for further commerce was furthering and substantially affecting interstate commerce within the meaning of the 1939 amendment. In discussing the effect of that amendment the court said:

> "The statute, broadened by the 1939 amendment, now reads: 'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.'
>
> Despite any question as to whether plaintiff might have recovered under the original act (see New York Central Ry. v. Marcome, 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892), it is clear that he is within the scope of the amendment. Under the original statute experience demonstrated continued difficulty in ascertaining when the work of an employee was part of interstate commerce. The amendment, much wider in scope, was inspired by a desire to avoid such confusion. Congress' intent to include any employee who performs services which in any way further or affect interstate commerce is clear. Ermin v. Pennsylvania Ry., D. C. N. Y., 36 F. Supp. 936; Southern Pac. Co. v. Ind. Acc. Comm., Cal. App. 113 P. 2d 768, 770, affirmed by California Supreme Court in 19 Cal. 2d 883, 120 P. 2d 888; Piggue v. Baldwin, 154 Kan. 708, 121 P. 183; Louisville & N. Co. v. Potts, Tenn. Sup., 158 S. W. 2d 729)."

It will thus be seen that in the case of injuries of employees of interstate carriers in the state of Illinois the Supreme Court of Illinois (case at bar) holds one

way and the Federal Circuit Court of Appeals of this Circuit (*Edwards* case) holds just the opposite. This emphasizes what was said by us on page 27 of our petition for certiorari to the effect that the rights of an injured employee will depend upon whether he goes into one court or another, although there should be uniformity of decision throughout the Nation in applying the Federal Employers' Liability Act.

Respondent's answer to our petition for writ of certionari is based on the following propositions:

I.

He says that out of sympathy respondent should be allowed to retain the benefits of the award because

(a) He has received "horrible and permanent mutilation" (p. 2 of answer).

(b) If respondent cannot recover on the basis of the Illinois Workmen's Compensation Act he must proceed under the Federal Employers' Liability Act, "which he probably could not do because of the length of time since his injury and because he would be required to prove negligence on the part of his employer" (p. 6 of answer).

II.

He says that "Nowhere is there any evidence to show that respondent was engaged *at any time in any duties* pertaining to interstate commerce, or in furtherance of interstate commerce" (p. 3 of answer).

III.

He says that one the grounds stated by the Supreme Court of Illinois in the case at bar, if effect is given to the clear and unambiguous wording of the 1939 amendment the act is beyond the scope of the powers of Congress.

We shall take these points up in the order set forth above.

I.

(a) A studied effort is made on the part of counsel for respondent to convince this Court that the case at bar is not a proper one for this Court to review because respondent has "horrible and permanent mutilation," (p. 2 of answer) and because there still "pertains a long period of convalescence and unemployment" (Ans. p. 6). Obviously the seriousness of respondent's injuries have no bearing on existence of liability. As a matter of fact, however, respondent's claim of permanent disability has no foundation in the record. As shown by the opinion of the Supreme Court of Illinois (R. 57), "respondent's injuries, while serious, apparently resulted in no permanent disability. There is no dispute as to the above facts or as to the nature and extent of the injuries." The finding by the arbitrator was that respondent's injuries resulted in *temporary* total disability. Compensation was allowed him for a period of 43-4/7 weeks. On review the period was increased to 58 weeks and this award was confirmed by the Circuit Court of Cook County, Illinois. No claim is made that the award of 58 weeks' disability is inadequate.

(b) In a further effort to have this case tried on sympathy rather than on the law the respondent on page 6 of his answer says that "should he be required to proceed under the Federal Employers' Liability Act" he probably could not do so because of the length of time since his injury, and that he would be required to prove negligence on the part of his employer to recover under the Federal Act.

Respondent thus intimates that the statute of limitations has now run on a suit under the Federal Employ-

ers' Liability Act. This is not true. The accident occurred on March 11, 1940, and the statute of limitations will not run until March 11, 1943 (Section 56, U. S. Code, Title 45).

As to respondent's contention that he should be allowed to retain the award because he could not prove negligence on the part of petitioner in an action under the Federal Employers' Liability Act, we can only point out that Congress in the exercise of its powers saw fit to bring respondent under the Federal Employers' Liability Act and the court has no power to vitiate an act of Congress because of hardship in a particular case. Congress felt that on the whole greater benefits would accrue to the employees of interstate carriers by the passage of the act than existed before that time. The mere fact that this case is one instance where the benefits may not be as great as before the passage of the Act cannot destroy the validity of the Act.

II.

At the bottom of page 3 of the answer respondent states that his duties were "preventive only" and that "nowhere is there any evidence to show that respondent was engaged *at any time in any duties* pertaining to interstate commerce." On page 4 counsel for respondent also say that Stoll "merely protected the property of his employer against thefts and trespasses—violations of local laws and ordinances." These are misstatements. The duties of respondent are stated by the Supreme Court of Illinois in its opinion at page 56 of the record. They were not only to act as patrolman and as such to "patrol the railroad right of way in his district, look out for fires; eject or arrest trespassers, examine and test seals on cars, (both interstate and intrastate) and protect the cars and their contents from thieves and

trespassers", but they were also "to inspect passing trains, (both interstate and intrastate,) for hot boxes and other defects, and observe the tracks for broken rails and obstructions."

In addition to those duties enumerated by the Supreme Court of Illinois Stoll testified that a part of his duties were "to protect company property and lives of passengers on trains moving over those tracks" (R. 11). It is apparent that Stoll's duties were of the utmost importance to the safety of interstate commerce; yet page 5 of the answer says that his duties "cannot be said to be the furtherance of interstate commerce or directly or closely or substantially affecting such commerce." The mere statement of respondent's argument shows its absurdity. It is difficult to imagine duties of any other employees which could be more essential to or would more "directly, closely and substantially" affect interstate commerce.

With respect to whether Stoll's duties were in interstate commerce, respondent's attorneys argue that an employee is not under the Act if his duties are solely those of a patrolman. Respondent ignores the case of *Missouri Pacific R. R. Co.* v. *David*, 284 U. S. 460, cited on page 23 of our petition, the case of *Wheelock* v. *Industrial Commission*, 318 Ill. 537, cited on page 24 of our petition, as well as the cases from various other jurisdictions cited on page 30 of our petition, all holding that a patrolman comes under the Federal Employers' Liability Act. The only authority relied on by respondent for his argument that policemen do not come under the Federal Employers' Liability Act are two Alabama cases. Both of these cases were decided prior to the case of *Nichols* v. *St. L. & S. F. R. Co.*, 151 So. 347 (Ala.), cited on page 30 of our petition, and both of these cases are

discussed in the *Nichols* case, one of them being distinguished and the other in effect overruled.

In the *Nichols* case a railroad yard policeman was shot while attempting to arrest a person who broke into a freight car of a train containing interstate cars. The Supreme Court of Alabama held that the policeman's duties brought him under the Federal Employers' Liability Act and that therefore he could not recover under the state Workmen's Compensation statute. The *Nichols* case cites as one authority the quotation from Roberts Federal Liabilities of Carriers contained on pages 28 and 29 of our petition for certiorari and also the decisions cited in the notes to that text (including several Illinois Supreme Court cases). The *Nichols* case also relies on the following cases as authority: *Missouri Pacific R. R. Co.* v. *David,* 284 U. S. 460 (discussed on page 23 of our petition); *Philadelphia, B. & W. R. Co.* v. *Smith,* 250 U. S. 101, where it was held that a cook on a camp car furnishing workmen bed and board while working on an interstate railway was engaged in interstate commerce; *St. L. S. F. & T. Ry. Co.* v. *Seale,* 229 U. S. 156, where a yard clerk whose duty it was to take the number of and seal up and label cars, some of which were engaged in interstate and some in intrastate traffic, was held to be directly engaged in interstate commerce; and *Delaware, L. & W. R. Co.* v. *Busse,* 263 Fed. 516, where the holding was that a watchman on a pier used for interstate commerce was engaged in such commerce. Thus, in Alabama (the only jurisdiction cited by respondent as holding that policemen do not come under the Federal Employers' Liability Act) the latest decision of the Supreme Court of that state holds that such employment *does* bring the employee under the Federal Act.

In another respect the conclusion in the *Nichols* case is applicable to the case at bar. There, in answer to

a similar "sympathy" argument, the court points out that while the facts before it might present a hard case, "hardships make shipwrecks of the law", and that although the court might be in entire accord with the humane spirit of the compensation statute, yet it could not extend it beyond its legitimate scope; that if the work was interstate in character the federal statute was supreme and would have to control; and that therefore there could be no recovery.

While respondent argues that his police duties were not enough to bring him under the Act, he completely ignores the question of whether his other duties were such as to bring him under the Act. He thereby impliedly admits the contention in our petition for certiorari and authorities there cited that such duties did bring him under the Act.

III.

As to whether the plain and unambiguous language of the 1939 amendment can be given effect without rendering the act unconstitutional, respondent cites as his authority a quotation from the opinion of the Supreme Court of Illinois in the very case which we are asking this Court to review. The unsoundness of the reasoning of the Supreme Court of Illinois in this case has been demonstrated in our petition for writ of certiorari, and it therefore is not necessary to reiterate what we there said. Respondent's only other attempt to argue that the amendment is unconstitutional is by a further quotation from *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1. On page 22 of our petition we have pointed out that actually this case supports the validity of the 1939 amendment, and on that page of our petition we have quoted an applicable portion of the *Jones & Laughlin* opinion. Respondent on page 9 of his

answer quotes the same portion of the *Jones & Laughlin* opinion but adds the next following sentence of that opinion to the effect that the power of Congress over interstate commerce may not be extended "so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would effectually obliterate the distinction between what is a national and what is local and create a completely centralized government." On pages 15 and 16 of our petition we have cited four recent decisions of this Court, each of which is compelling authority for the proposition that the 1939 amendment is not beyond the scope of the powers of Congress.

In a half-hearted effort to sustain the proposition that the 1939 amendment has gone beyond the powers of Congress, respondent cites the cases of *Boston & Maine R. R.* v. *Armburg*, 285 U. S. 234, and *Industrial Accident Commission of the State of California* v. *Davis*, 259 U. S. 182. Neither of these cases is any authority for the contention that the 1939 amendment was beyond the powers of Congress.

The *Armburg* case holds that the terms of the Federal Employers' Liability Act previous to the 1939 amendment did not purport to apply to any accident sustained by an employee who was not at the time of accident doing interstate work. The case does not hold that Congress lacked the power to broaden the scope of the Federal Employers' Liability Act. Incidentally the case is good authority for the proposition that the burden is on one who assails a statute to establish its unconstitutionality. Respondent in the case at bar has utterly failed in this burden.

The *Davis* case likewise is based on the wording of the Federal Employers' Liability Act as it existed prior to the 1939 amendment. The court had no occasion to pass on the question here presented as to whether Congress could broaden the scope of the Act.

On page 4 of the answer, respondent charges that petitioner seeks to extend the operation of the Federal Act to the point where every employee of an interstate railroad would be subject to the Act. Petitioner makes no such claim, and seeks only to give effect to the language of the 1939 amendment whereby there is brought under the Act any employee of a carrier any part of whose duties in any way "directly or closely and substantially" affect interstate commerce. Obviously there are still a great many employees of an interstate carrier who have no duties which "directly or closely and substantially" affect interstate commerce and such employees would not be affected by the amendment.

The only other contention of respondent is that a determination of the question presented in this case will not "clarify for all time the application of the amendment to the Act" (answer p. 6) and that because a decision in this case cannot once and for all determine all possible questions which may later arise in other cases involving the Amendment, this case should not be reviewed by this Court. If this reasoning were correct it would apply to the Federal Employers' Liability Act itself and would have prevented this Court from having decided a single one of the many cases that have arisen in the past under the Federal Employers' Liability Act.

CONCLUSION.

We respectfully submit that the effect of the 1939 amendment of Section 1 of the Federal Employers' Liability Act should be authoritatively decided by this Court, and that therefore the petition for writ of certiorari should be granted.

Respectfully submitted,

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